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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re J.M. a Person Coming Under the Juvenile Court Law.	
STANISLAUS COUNTY COMMUNITY SERVICES AGENCY, Plaintiff and Respondent, v. B.G., Defendant and Appellant.	F056366 (Super. Ct. No. 510839) **O P I N I O N**

THE COURT[*]

APPEAL from orders of the Superior Court of Stanislaus County. Nancy B. Williamsen, Commissioner.

Amy Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

John P. Doering, County Counsel, and Carrie M. Stephens, Deputy County Counsel, for Plaintiff and Respondent.

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[*] Before Vartabedian, Acting P.J., Levy, J., and Gomes, J.

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INTRODUCTION

Appellant B.G.'s four-month-old nephew, D.L., was a foster child in her care when the child suffered devastating brain injuries consistent with shaken baby syndrome. Appellant denied inflicting any intentional injuries and claimed she tripped and accidentally dropped D.L. in his car seat. Appellant's two older children were taken into protective custody and adjudged dependents, solely based upon the non-accidental injuries suffered by D.L. and appellant's refusal to admit her responsibility. In the midst of the dependency proceedings for her older children, appellant gave birth to another child, Jo.M., who was immediately taken into protective custody and a dependency petition filed, again based upon the non-accidental injuries suffered by D.L. and appellant's refusal to admit her responsibility.

The instant case is appellant's appeal from the juvenile court's findings at the contested jurisdiction/disposition hearing for Jo.M., that D.L.'s injuries were not accidental, that he was the victim of shaken baby syndrome, and Jo.M. was at substantial risk for serious injury if he remained in appellant's custody. Appellant challenges the disposition order which removed D.L. from her custody, and argues the court failed to consider less restrictive and alternative means to return D.L. to her custody.

This case involves two lengthy and simultaneous dependency hearings, all of which dealt with the underlying issue of whether appellant inflicted non-accidental injuries on D.L. There were no allegations that appellant injured or abused her own children. In both dependency cases, however, the juvenile courts found that appellant was responsible for D.L.'s grievous neurological injuries and sustained the petitions as to her two older children, and to the infant child Jo.M., who is the subject of this case,

because they were at substantial risk for serious physical injury. We will affirm.[1]

FACTS

In September 2007, appellant and her boyfriend, W.M., lived in Modesto with appellant's children, six-year-old M.K. and six-month-old Ja.M. W.M. was Ja.M.'s father.[2] Appellant's infant nephew, D.L., also lived with the family. D.L. was born in May 2007. He had been removed from the custody of his mother (appellant's sister) because of child abuse allegations, he was a dependent of the Stanislaus County Juvenile Court, and the Stanislaus County Community Services Agency placed D.L. in appellant's house as a foster child in June 2007.[3]

At 8:00 a.m. on September 20, 2007, appellant called 911 for the paramedics to respond to her house because four-month-old D.L. was unresponsive, he was having a seizure, and he was vomiting. The paramedics found D.L. unresponsive and extremely lethargic.

D.L. was taken to Memorial Medical Center in Modesto, where he continued to have significant seizures and went into respiratory failure, which required intubation. The physicians determined he suffered from brain injury resulting in intracranial bleeds. The physicians were able to stabilize D.L., but he showed bleeding on the brain in the rear of his skull, and possibly more bleeding in the front of his skull. The bleeding in the back appeared to be from a new and fresh injury, but the frontal bleeding could have been old blood or possibly some other type of fluid.

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[1] We take judicial notice of the records and unpublished opinions filed in the dependency proceedings for appellant's older children. (*B.G. v. Superior Court* (Jan. 15, 2009, F056348) [nonpub. opn.]; *In re M.K.* (Feb. 10, 2009, F055442) [nonpub. opn.].)

[2] Appellant also had a daughter, who was in the custody of that child's father pursuant to an agreement between the parents, and that child was not involved in the instant dependency proceedings.

Due to the severity of the injuries, D.L. was transported on the same day by helicopter to Children's Hospital Central California in Madera, where physicians found intracranial hemorrhaging, retinal hemorrhaging in both eyes, but no injuries to the outside of the skull. The physicians reported that D.L.'s physiological reaction to the infliction of such brain injuries would have occurred very soon after the initial injury.

Appellant's initial statements

Law enforcement officers and social workers were contacted when D.L. was taken to the Modesto hospital. At 10:21 a.m. on September 20, 2007, appellant spoke to a police officer at the Modesto hospital and explained how D.L. was injured. Appellant said that on the afternoon of the previous day, she was bored and loaded Ja.M. and D.L. in her car for a drive. When appellant arrived home, she parked the car in the driveway, opened the left rear passenger door, and removed Ja.M. and his car seat from car. She placed Ja.M. in his car seat on the ground behind her. She reached into the middle rear seat and unbuckled D.L.'s car seat. As she stepped back from the car, she tripped over Ja.M.'s car seat and lost control of D.L. in his car seat. Appellant said D.L.'s car seat fell down and hit the cement, and she thought it rolled a couple of times. Appellant said she did not see any injuries on D.L.

As the officer asked for details about how D.L. fell, appellant was "extremely vague" in her description of the incident. She said D.L. stayed in the car seat and she thought it hit the ground very hard. She also said she had trouble grasping things with her hands ever since she had an epidural during her last pregnancy.

Appellant told the officer D.L. appeared to be gasping as if the fall knocked the breath out of him, but then he regained his composure and started to cry. He seemed normal for the rest of the evening, she checked him through the night, and he slept without any problems. In the morning, she placed Ja.M. and D.L. in their stroller and

walked M.K. to school. When she got home, D.L. went into medical distress and she called 911.

W.M., appellant's boyfriend, arrived at the Modesto hospital shortly after D.L. was transported by the paramedics, and said he did not know anything about appellant dropping D.L.'s car seat the previous day. W.M. said he noticed D.L. appeared extremely tired the previous night.

A social worker interviewed appellant at the Modesto hospital, and appellant related the same story about tripping over Ja.M.'s car seat and dropping D.L. in his car seat. Appellant added that she also fell down as she tripped, she dropped D.L.'s car seat, D.L. flew over her head, tumbled, and his car seat landed on its side. Appellant also added that D.L. did not eat that much when she fed him dinner. The social worker asked appellant why she didn't call an ambulance when she dropped D.L. Appellant said she thought about it but D.L. seemed fine. Appellant said she did not tell W.M. about the incident because she did not want to worry him.

At 11:00 a.m. on September 20, 2007, a detective arrived at the Modesto hospital and interviewed appellant about the incident. Appellant said she went for a drive with Ja.M. and D.L. the previous day because she just lost her job and was bored, and again related the story about tripping over Ja.M.'s car seat and dropping D.L. in his car seat. This time, appellant said that when she let go of D.L.'s car seat, the handle was still upright over the front of the child. D.L.'s car seat landed on its back and eventually stopped near the rear of her car, the carrying handle was still in the upright position, and his body did not make contact with the ground. Appellant said D.L. slept through the night, but he was unresponsive when she tried to wake him in the morning, and she called 911 because he suffered a seizure, vomited, and his eyes rolled to the back of his head. This version contradicted her earlier statement, that she put D.L. in the stroller, walked M.K. to school, and then D.L. showed distress.

Appellant's subsequent statements

On the morning of September 21, 2007, the day after D.L. was taken to the hospital, Detective Eric Jones and a social worker met with appellant at her house. The detective examined D.L.'s car seat and saw no indication that it had been involved in any type of high impact. The detective videotaped and photographed appellant, as she stood by her car in the driveway and demonstrated how she dropped D.L.'s car seat. Appellant showed how she removed D.L.'s car seat from the back seat, she dropped D.L.'s car seat, and fell on her backside as she dropped it. The detective noted that appellant's fall would have reduced the distance that D.L. fell when she dropped the car seat.

A social worker spoke to appellant's mother, who reported that appellant said she was carrying the car seats for both Ja.M. and D.L. in her hands, she tripped, she dropped D.L. in his car seat, and he went flying. Appellant's mother was concerned that D.L. was underdeveloped because appellant did not give him enough attention. Appellant's mother reported that during visits to the house, she found appellant in the front room with Ja.M., while D.L. was in the back bedroom with the door closed.

Appellant's mother said appellant hit her children, and she believed W.M. witnessed it. Appellant's mother believed appellant was capable of hurting D.L. in a rage, and she thought appellant had a "'rage about her.'" Appellant would "'throw her body all over'" in a rage. Appellant had been abusive toward her sister, and often assaulted the sister when they were younger.

Appellant's aunt was also interviewed, and she had seen appellant leave D.L. crying in the house for an extended period while appellant was outside. The aunt felt appellant favored her own child, Ja.M., and D.L. was being neglected. Appellant told her aunt that she did not want D.L. anymore, and she could not handle taking care of him. Appellant's aunt told the police that she had not seen appellant being physically abusive

toward the children, but believed appellant was verbally abusive, yelled, and snapped at the children.

D.L.'s mother (appellant's sister), told the police that she did not want D.L. placed with appellant because appellant had her own infant to care for, and appellant had been abusive to her in the past. Appellant's sister described appellant as behaving erratically, often losing her temper and assaulting her sister while they were growing up. Appellant's sister reported appellant yelled at family members for not helping with D.L.'s care.

D.L.'s injuries

Dr. Samuel Lehman and Dr. Robert Dimand, both physicians with Children's Hospital, reported their concerns that D.L. suffered from non-accidental trauma. Dr. Dimand reported that D.L. experienced significant seizure activity, and he was concerned about the intracranial and retinal hemorrhages. Dr. Lehman reported D.L. had bilateral retinal hemorrhaging, respiratory failure, and seizure activity.

Dr. Donald Fields, a physician at Children's Hospital, reported D.L.'s condition improved a few days after he arrived at the hospital, and he was in stable but critical condition. Dr. Fields advised the social worker that a child dropped from a height of six feet would not have sustained brain injuries of the magnitude of those sustained by D.L. D.L. did not have a skull fracture, scratches, or contusions on his head, and the absence of those conditions was inconsistent with appellant's account of the incident.

Dr. Fields reported symptoms such as seizures and vomiting would have been immediately observed in D.L., within minutes or seconds after the incident, but appellant said such symptoms did not occur until 17 hours after she dropped him. Dr. Fields said it would have been highly unlikely for D.L. to have survived the night if he had suffered such injuries the previous afternoon.

Dr. Fields reported that based on his experience, he believed D.L.'s injuries were not consistent with appellant's description of the incident and her videotaped demonstration, and the brain injuries were "definitely" from "'shaken baby syndrome,'" based on the presence of retinal hemorrhages and two subdural hematomas. One of the hematomas was older than the other. Dr. Fields stated D.L.'s injuries were the result of being violently shaken, causing a repeated acceleration and deceleration, and the shaking and rotational forces resulted in a diffuse injury to the brain. Appellant's description of the incident would have resulted in a very distinct origin point of injury in D.L.'s brain. However, D.L.'s brain scan showed no obvious origin point to his injury but a diffuse injury. D.L.'s retinal hemorrhages were extensive and not consistent with appellant's description, and he would not have suffered the retinal hemorrhages if he had been dropped as appellant claimed.

Dr. Fields reported that D.L. was expected to survive, but he suffered moderate to severe irreversible brain damage and he would require extensive future care.

It was also determined that D.L. was underweight and lost nearly three pounds in the 10 days between a well-baby checkup on September 10, 2007, and when D.L. was taken to the hospital on September 20, 2007. He received fluids during his hospitalization, his weight increased, and he showed increased total body tone after he had been in the hospital for a few weeks.

Appellant's arrest

On September 25, 2007, police officers went to appellant's house and asked her to again demonstrate how she dropped D.L.'s car seat. Appellant went to the driveway and showed the officers how and where the car seat fell. A detective confronted appellant and said that D.L.'s injuries were not consistent with her description and she needed to explain what happened. Appellant became emotional and stated to cry. She was arrested

for infliction of traumatic injury to a child (Pen. Code, § 273d, subd. (a)). Appellant was one month pregnant when she was arrested.

There was no evidence that appellant neglected or abused her children, M.K. and Ja.M., but they were taken into protective custody because there was a concern they were at risk for similar injuries if they remained in appellant's home. An officer later interviewed six-year-old M.K., who said he did not see D.L. shaken or dropped, he was at school when D.L. was taken to the hospital, and that appellant and W.M. said it was his other brother, Ja.M., who had been dropped in the car seat. M.K. also said that on past occasions, appellant and W.M. disciplined the children with time-outs or spanking, but he had not been spanked in a long time.

After appellant was arrested, an officer interviewed one of her neighbors, who related a recent conversation in which appellant said she was pregnant. The neighbor congratulated her, and appellant said the timing was not good. Appellant also told the neighbor that she resented D.L. because the family was not helping her, she did not think that she was going to be able to keep D.L., and D.L.'s father needed to help out. This neighbor also related an incident which occurred on the day that D.L. was taken to the hospital. The neighbor was outside her own house and heard a baby crying, and the paramedics arrived at appellant's house about two hours later.

Appellant was interviewed after she was arrested. She was advised of and waived her rights. Appellant was very emotional and denied shaking D.L., and said she would never intentionally hurt him. The detective explained how much force was needed to cause the injury. Appellant denied injuring D.L. and said she did not know who could have done it.

The dependency petition for M.K. and Ja.M.

On September 25, 2007, respondent filed a petition in the Superior Court of Stanislaus County, alleging that appellant's children, M.K. and Ja.M, were dependents

and at substantial risk for future injury based upon the non-accidental injuries suffered by D.L. while in appellant's custody.

On February 11, 2008, Ja.M. was released to the custody of his father, W.M., under the court's supervision; the record infers that W.M. had moved out of appellant's house. M.K. was placed with his paternal grandmother.

In February 2008, Dr. Fields, who was also the director of child advocacy for Children's Hospital, filed a report that D.L. had extensive retinal hemorrhages, both centrally and peripherally, and repeated head CTs showed increasing infarction or death of various areas of his brain. D.L. slowly began to have hypertonicity (abnormally rigid muscle tone) as a result of his severe brain damage, which would continue to be a problem throughout his life.

Dr. Fields reported that D.L. did not have any skeletal fractures, bleeding disorders, or metabolic disorders to explain his condition. Based on all the physical findings while he was hospitalized, Dr. Fields believed D.L. was the victim of shaken baby syndrome and would be neurologically devastated for his entire life. Most of the children who suffer from this syndrome develop progressive scoliosis and restricted lung disease, with increasing bouts of pneumonia, which ultimately takes their lives in their midteens to early adulthood.

In March 2008, the juvenile court conducted a seven-day contested jurisdiction/dispositional hearing in the dependency case for M.K. and Ja.M., as to the underlying allegations of whether D.L. suffered from non-accidental injuries inflicted by appellant. Dr. Fields testified about shaken baby syndrome and the basis for his diagnosis in D.L.'s case; the court denied appellant's motion to strike Dr. Fields's testimony. The court granted appellant's motion for continuance to call an out-of-state expert to challenge Dr. Fields's testimony, as long as the expert personally appeared. The expert failed to appear and the court denied appellant's second request for a

continuance. At the conclusion of the hearing, the court found D.L. sustained non-accidental injuries caused by appellant.

On April 18, 2008, the court adjudged M.K. and Ja.M. as dependents within the meaning of Welfare and Institutions Code[4] section 300, subdivision (b), and removed the children from appellant's custody. The court ordered family reunification services for appellant and W.M. Appellant appealed from the juvenile court's disposition orders as to M.K. and Ja.M. (F055442).

Birth of Jo.M.

The instant case involves the dependency proceedings for appellant's infant son, Jo.M., who was born on April 22, 2008, in the midst of the proceedings for her two older children. W.M. is Jo.M.'s presumed father.

At the time of Jo.M.'s birth, appellant told the hospital's social worker that she did not have any history with child protective services (CPS), and that she and W.M. planned to get another place to live together. Appellant later told the social worker that she denied any prior CPS history because the conversation occurred while another patient and visitors were present in her hospital room.

On April 24, 2008, respondent took Jo.M. into protective custody at the hospital, based on appellant's denial of a prior CPS history and the pending dependency proceedings for appellant's two older children. While appellant and W.M. were complying with the court-ordered services in the pending dependency case, the court had determined that D.L. was the victim of non-accidental injuries caused by appellant, appellant failed to take responsibility for those injuries, and she had not therapeutically addressed the issues which led her to injure D.L. Respondent concluded that appellant

[4] All further statutory citations are to the Welfare and Institutions Code unless otherwise indicated.

was capable of causing similar injuries to another child in her care, and Jo.M. would be at risk if he remained in her custody.

Jo.M's dependency petition

On April 30, 2008, respondent filed a first amended petition which alleged Jo.M. was a dependent child within the meaning of section 300, subdivisions (a), (b), and (j). All the counts were based on the allegations that appellant was responsible for the non-accidental brain injuries suffered by D.L., D.L. was the victim of shaken baby syndrome, appellant refused to admit her responsibility for D.L.'s injuries, dependency petitions had already been sustained for her older children, M.K. and Ja.M., and Jo.M. was at substantial risk of injury if he stayed in her custody. On the same day, the court conducted the detention hearing, placed Jo.M. with his father, W.M., and provided for appellant to have two supervised visits per week.

On May 29, 2008, a second amended petition was filed which alleged Jo.M. was a dependent child within the meaning of section 300, subdivision (j), and eliminated the allegations under section 300, subdivisions (a) and (b). The subdivision (j) allegation was based upon the juvenile court's rulings in the dependency case involving M.K. and Ja.M., that Jo.M. was at a substantial risk of injury because of her failure to take responsibility for D.L.'s injuries.

Appellant moved to dismiss Jo.M.'s second amended petition because it eliminated the allegations under section 300, subdivisions (a) and (b), and only alleged Jo.M. was a dependent under subdivision (j) based upon the findings as to D.L. in the case of his half-siblings. Appellant argued the amendments violated her due process rights and were intended to prevent her from introducing expert testimony to challenge the underlying claim as to whether D.L. was a victim of shaken baby syndrome. Appellant argued the court's findings in the half-siblings' case were not final and could not be relied upon to find Jo.M. was a dependent child under subdivision (j).

The juvenile court granted appellant's motion to dismiss the second amended petition, and held that Jo.M.'s dependency would be considered pursuant to the allegations in the first amended petition under section 300, subdivisions (a), (b), and (j). The court held there were no final judgments in the dependency cases for M.K. and Ja.M., and the court's findings in those cases were not subject to res judicata or collateral estoppel effect in Jo.M.'s case. The court further held appellant could introduce evidence at Jo.M.'s contested hearing to challenge D.L.'s diagnosis with shaken baby syndrome and whether D.L. suffered non-accidental injuries in her care.

Respondent's addendum reports

Respondent filed addendum reports in Jo.M.'s case which set forth the following developments. On June 6, 2008, respondent received a report that W.M. left Jo.M. unattended in a car while he went inside a home to give an estimate as part of his employment. W.M. admitted the incident but said that one-year-old Ja.M. was in the car, and not the infant Jo.M. W.M. was very defensive and said he had no choice in the matter.

On June 10, 2008, the social worker met with appellant, her counselor, and her attorney, reviewed respondent's expectations for compliance with the reunification program, and informed appellant that she needed to admit what she did. Appellant replied that she would not do what was required.

On June 19, 2008, W.M. called the social worker to report that appellant had been hospitalized following an overdose of Xanax, and that appellant got into a fight with her roommate and was kicked out of the house. Appellant told W.M. that she loved him and the boys but she could not take it anymore. Appellant's preliminary hearing in the criminal case for D.L.'s injuries had been scheduled for the next day.

On June 26, 2008, the social worker spoke to appellant, who confirmed she had been in the hospital on a 72-hour hold and had just been released. Appellant said she was

no longer taking Xanax. She declined to answer any more questions and told the social worker to speak to her attorney. However, appellant's former roommate reported that appellant's suicide attempt was fake, and the roommate kicked appellant out of the house because appellant was asking the neighbors for marijuana.

On July 16, 2008, W.M. reported that appellant called that morning, she was going to make another suicide attempt, and she was going to succeed this time. W.M. admitted he broke up with appellant and was seeing another woman, and that prompted appellant's suicide threat.

Respondent's addendum report filed July 30, 2008, stated appellant had not made progress in addressing the issues which led to the dependency of her children and she continued to deny responsibility for D.L.'s injuries. Respondent stated that the original concerns which led to the removal of Jo.M. at his birth had been compounded by appellant's display of significant mental health issues and purported suicide threats.

Respondent was also concerned about the allegations that appellant asked her neighbors for marijuana, and noted that when D.L. was taken to the hospital, appellant said that she had smoked marijuana a few months earlier. Based on that admission and former roommate's allegations, the social worker asked appellant for a drug test but she refused.

Respondent subpoenaed appellant's mental health records as relevant evidence for the contested hearing in Jo.M.'s case. Appellant objected and argued the records were protected by the physician-patient and psychotherapist-patient privileges. The juvenile court conducted a confidential hearing and held the majority of the records were privileged and were not subject to disclosure unless appellant placed her mental status at issue during the contested hearings. However, the court granted disclosure of portions of the records which were not protected by any privileges, and which revealed that appellant took 20 Vicodin pills and an unknown quanity of Xanax on her first suicide attempt.

Jo.M.'s contested jurisdiction/dispositional hearing

In August and September 2008, the juvenile court conducted a ten-day contested jurisdiction/disposition hearing as to the first amended petition in Jo.M.'s dependency. The parties focused on the underlying issue as to whether D.L. suffered non-accidental injuries and appellant was responsible.

The first witness was Dr. Fields, called by respondent as an expert. After extensive voir dire, he was qualified as an expert in shaken baby syndrome, child abuse, and neglect. Dr. Fields, a child advocacy physician at Children's Hospital, testified he had treated 3,000 to 4,000 abused or neglected children. Dr. Fields began his testimony with a general explanation of the diagnosis of shaken baby syndrome, its causes, observable symptoms, and the effect on infants.

Dr. Fields explained that shaken baby syndrome is a constellation of brain injury symptoms in children less than three years old, with subdural or subarachnoid hemorrhage, brain swelling (edema), and retinal hemorrhages. It can occur with or without blunt head trauma, because an infant can be shaken and suffer brain injury, even without impact or a skull fracture. The less severe symptoms are lethargy, irritability, and poor appetite, whereas the more severe symptoms are seizures, unconsciousness, difficulty breathing, and death. The perpetrator is usually a caregiver who cannot cope with a crying infant.

Dr. Fields testified a child, particularly an infant, is vulnerable to brain injury when shaken because the head is relatively heavy compared to the rest of the body, supported by weak neck muscles, and the brain is not yet covered very well in the protective coating. The acceleration and deceleration from shaking the child's head will disrupt the nerves and break the bridging veins; and hemorrhaging occurs in either the subdural or subarachnoid spaces. If the hemorrhages are deeper in the brain, it implies that greater force was used to break those veins. When the blood supply to the brain is

interrupted from swelling or hemorrhaging, there is brain infarction, which means part of the brain is stroked or dead.

Dr. Fields explained that when an infant is shaken, parts of the brain move at different speeds relative to each other, the outside moves more than the central part of the brain, and those areas shear apart. The shearing injury disrupts the nerves that are developing inside the brain, the brain repeatedly swells, and the child is left neurologically devastated or dies.

Dr. Fields testified retinal hemorrhages are also seen in cases of shaken baby syndrome, and can be seen as dot blot hemorrhages in multiple layers. As the child is shaken, the eye moves and pulls on the retina, and hemorrhages result. A child can also suffer retinal hemorrhages as a result of a car accident, but retinal hemorrhages that are outside the posterior pole, multi-layered hemorrhages, and dot blot hemorrhages are indicative of shaken baby syndrome.

In the midst of his direct examination, the court excused Dr. Fields so that appellant could call her out-of-town expert out of order, Dr. John Plunkett of Minnesota. After an extensive voir dire, Dr. Plunkett was designated as an expert in the mechanism and diagnosis of infant injury. Dr. Plunkett was a retired forensic pathologist and medical examiner, and had last treated an infant 30 years ago.

Dr. Plunkett testified shaken baby syndrome did not exist, it was "'the medical scandal of the last 20 years,'" and it was physically impossible to shake an infant hard enough to obtain the levels of acceleration necessary to cause subdural hemorrhages, brain swelling, or retinal hemorrhages. He also believed it was not scientifically sound to diagnose shaken baby syndrome based upon retinal hemorrhages and brain edema.

Dr. Plunkett testified D.L.'s brain injuries were caused by brain swelling, the brain swelling was the result of trauma, but the trauma could have been the result of inadvertent impact or no identifiable impact; the swelling was not the result of shaking,

and there was no evidence of abuse. Dr. Plunkett testified the blood on the top and rear of D.L.'s skull was "simply sedimentation" from a re-bleed of a pre-existing hygroma in the front of D.L.'s skull. The brain swelling could have began at some earlier time and reached a critical threshold as D.L. showed symptoms.

Dr. Plunkett conceded it was "not a good idea" to shake an infant because an infant could suffer neck damage, stop breathing, and die, but he testified that an infant could not suffer brain injury from being shaken, and it was not humanly possible to shake an infant to cause such brain injuries. Dr. Plunkett claimed major research papers regarding shaken baby syndrome had "expired" and were invalid, and he did not know of any pathologists or biomechanical engineers who agreed the syndrome existed. Upon further questioning, however, he conceded that physicians and pathologists had signed onto published research papers about the existence and symptoms of shaken baby syndrome. Dr. Plunkett discounted medical studies that correlated infant brain injuries with confessions in shaking-only incidents, and testified that such injuries had to be the result of impact and the confessions were unreliable.

Dr. Plunkett reviewed the DVD of appellant's reenactments, and testified D.L.'s brain injuries were caused by brain swelling, which could have been the result of some sort of impact consistent with appellant's description. However, he also testified that "nothing" was required to cause D.L. to become "symptomatic," because he "could have had the subdural hematoma that he had, the resulting brain swelling, and the retinal hemorrhage that he had and no intervening incident whatsoever." Dr. Plunkett's opinion was based on the absence of any broken bones, bruises, or grip marks on D.L. Appellant "could have done nothing and ... this could have happened." He stated that "either nothing or impact" was the "most likely cause" of D.L.'s brain injuries because he had hygroma, which is "extra axial fluid connection that is abnormal. He ha[d] a small parafalcine subdural hemorrhage." It was impossible to determine with certainty when

the condition developed, but it could have been within three days prior to showing symptoms.

Dr. Plunkett testified it was inconceivable that D.L. lost two and a half pounds in body weight in the ten days between his well-baby check-up and admission to the hospital, and insisted the hospital's weight measurements were incorrect. Dr. Plunkett insisted that an infant with such a weight loss would have presented with severe dehydration and there was no evidence to suggest D.L. was dehydrated. Dr. Plunkett was asked why D.L.'s weight increased after he received fluids at the hospital. He insisted most emergency rooms did not have infant scales or the hospital's weight measurements were wrong, and he was sure D.L. was not weighed in the emergency room.

After Dr. Plunkett concluded his testimony, Dr. Fields resumed the stand and testified that he worked in the emergency room at Children's Hospital, there were infant scales in the emergency room, he was intimately involved in D.L.'s treatment when he arrived at the hospital, and he knew that D.L. was weighed several times during his hospitalization because an infant's weight is crucial to determine appropriate medication dosages. Dr. Fields testified there was no reason to believe the weights were wrong, it was not inconceivable to see the kind of weight loss experienced by D.L., it raised issues as to nutrition and failure to thrive, and such situations were seen all the time. He believed D.L.'s weight was so low because he did not receive the appropriate amount of food and calories. There was no organic reason for his failure to thrive because he gained weight when he was fed appropriately during his hospitalization.

Dr. Fields turned to D.L.'s specific injuries, and testified that D.L. suffered from shaken baby syndrome, he had a shear injury to the brain from being shaken, the shaking caused the brain swelling, and the swelling caused the severe neurological damage to his brain. D.L. had developed encephalia malacia, or "spongy brain," which was caused

when parts of the brain died and were reabsorbed, leaving holes in the brain. There was an infarction of the brain where parts of the brain were dying.

Dr. Fields believed the injury in the front of D.L.'s head was not a hygroma, as Dr. Plunkett believed. Dr. Fields explained that in order to be a hygroma, the blood had to be completely dissipated, leaving only a clear fluid. In D.L., however, there was still old blood in this space and cerebral edema, which could have been one to two weeks old. Dr. Fields suspected this condition was the result of abuse. Dr. Fields testified D.L. could have been shaken the first time after his well-baby check on September 10, 2007, which would have resulted in symptoms such as irritability, fussiness, poor sleep, and poor appetite, which might have accounted for his weight loss.

Dr. Fields testified D.L.'s ophthalmological examination showed numerous dot blot retinal hemorrhages on the posterior pole, the mid-periphery, and the left eye had a macular hemorrhage. Dr. Fields testified there were very few causes for retinal hemorrhages outside the posterior pole, aside from shaken baby syndrome.

Dr. Fields disputed Dr. Plunkett's opinions about D.L.'s injuries, and testified he could not "fathom how you can destroy somebody's brain and have no type of trauma." "I think someone picked him up and shook the heck out of him." Dr. Fields also disputed Dr. Plunkett's assertion that the forensic pathology community disagreed with the existence of shaken baby syndrome.

Gwen K., paternal grandmother of appellant's son, M.K., testified she provided daycare for M.K. since he was an infant and was his current caretaker. Gwen K. maintained a friendship with appellant so she could see her grandson, because appellant would not allow her to see M.K. if Gwen K. disagreed with her about anything. Gwen K. was frequently in appellant's home and saw D.L., but she never saw appellant feed, hold, or nurture D.L. Gwen K. was concerned about appellant's lack of physical contact with D.L. because he was tiny, frail, and did not seem to thrive.

Gwen K. testified that on the day appellant allegedly dropped D.L.'s car seat, Gwen K. was at appellant's house late in the afternoon but appellant did not say anything about the incident. Gwen K. did not see D.L. or Ja.M. that day because they were asleep. Gwen K. did not hear appellant's story about D.L.'s accident until after D.L. was taken to the hospital. Gwen K. asked appellant why she didn't tell her about the accident when Gwen K. was at the house, and appellant said she was embarrassed to admit she dropped the baby. Appellant told Gwen K. she tripped over Ja.M.'s car seat as she removed D.L. from the car and D.L. went flying. Gwen K. asked appellant why she did not take D.L. to the doctor, and appellant said D.L. looked fine and there were no marks on him. Several months later, appellant called Gwen K., said she was going to speak to her lawyer, and asked what she had said about the accident, and whether appellant said D.L looked okay and there were no bumps or bruises on him.

Also at the hearing, the court accepted an offer of proof from W.M.'s counsel, that W.M.'s relationship with appellant had been over for two months and he was seeing someone else.

The court's jurisdictional/dispositional findings as to Jo.M.

After extensive argument from the parties, the juvenile court found true the allegations in the first amended petition for Jo.M. as to section 300, subdivisions (a), (b), and (j), that D.L. suffered a non-accidental injury, appellant caused the injury, and Jo.M. would be at substantial risk if returned to appellant's custody. The court specifically found Dr. Fields was a more credible witness than Dr. Plunkett, and Dr. Plunkett was not credible on several points, particularly his baseless assertion that emergency rooms do not have infant scales. The court also found Dr. Plunkett contradicted his own opinions over the course of his testimony, some of his opinions were "relatively outrageous," such as that D.L.'s injuries could have occurred without anything happening to him, and his testimony did not conform with any other medical opinions.

The court had significant concerns about W.M. because he continued to support appellant's position, and his body language during the contested hearing "was such he believes what was happening here is a bunch of hooey … and that he does not believe [appellant] posed any danger to this child." The court was also concerned about W.M.'s conduct in leaving Ja.M. unattended in a car on a hot day.

The court found by clear and convincing evidence there was a substantial risk of harm to Jo.M. if he was in appellant's custody, she had made limited progress in alleviating the causes which required placement, she was responsible for the life-long neurological damage suffered by D.L., and she posed a risk to any child in her care. The court allowed Jo.M. to remain with W.M. under the court's supervision with a family maintenance plan. The court examined the situation to determine if it could deny reunification services to appellant because it believed appellant would never comply, but it was unable to find any legal support to make such an order in this case. Therefore, the court granted reunification services to appellant, which included drug tests.

The court advised appellant that she could not comply with the case plan simply by attending classes, but she had to acknowledge that D.L. was damaged in a non-accidental manner and she was responsible for her actions. The court found appellant made limited progress in her reunification plan, ordered the parents to attend counseling, and provided for appellant to have two visits per month with Jo.M., with respondent to have the discretion to increase the supervised visits.

On October 23, 2008, appellant filed a timely notice of appeal of the court's jurisdiction and dispositional orders in Jo.M.'s case, which is the instant appeal now before this court (F056366).

Continued proceedings for M.K. and Ja.M.

In October 2008, the juvenile court conducted contested review hearings for M.K. and Ja.M. in their pending dependency matter. The social worker testified appellant

regularly visited the children and was never physically or verbally abusive toward them. However, appellant stated she would never admit hurting D.L., despite knowing that her refusal would foreclose reunification with her sons. Appellant argued she regularly participated in court-ordered services, there was no evidence M.K. could ever be a victim of shaken baby syndrome because he was older, and there was insufficient evidence that it would be detrimental to return him to appellant's custody.

The juvenile court rejected appellant's arguments and found her inability to cope with life's daily stressors, and her unwillingness to engage in therapy to understand why she harmed D.L., placed M.K. and Ja.M. at a substantial risk of harm if returned to her custody. The court also found appellant had not demonstrated the capacity to complete her case plan objectives and safely parent her children. The court terminated appellant's reunification services as to both M.K. and Ja.M., and set a section 366.26 hearing as to M.K. The court ordered Ja.M.'s continued placement with his father, W.M., and set a family maintenance review hearing.

Appellant filed a writ petition with this court to vacate the court's order terminating reunification services and setting a section 366.26 hearing for M.K. (case No. F056348). On January 15, 2009, this court denied appellant's writ petition and found substantial evidence supported the court's orders given the severity of D.L.'s abuse, appellant's adamant denial that she inflicted the injuries, and appellant's erratic behavior, which suggested drug use or mental instability.

In denying appellant's writ petition, this court rejected appellant's argument that she was improperly ordered to admit injuring D.L. as part of her reunification services for M.K. and Ja.M. This court noted that abuse immunity is available to parents such as appellant, who are involved in simultaneous criminal and dependency proceedings for child abuse. This court further noted that any statements appellant made in therapy that constituted an admission to the acts charged in the criminal proceedings could have been

barred from use in the criminal proceedings, absent some action on her part placing them at issue.

On February 10, 2009, this court filed an unpublished opinion which denied appellant's appeal from the juvenile court's jurisdiction and dispositional orders for M.K. and Ja.M. (F055442). This court found the juvenile court properly denied appellant's motion to strike Dr. Fields's three-day hearing testimony on shaken baby syndrome, and rejected appellant's arguments that Dr. Fields's testimony was speculative and conclusionary. This court affirmed the dispositional order removing M.K. from appellant's custody because there was significant evidence of appellant's unresolved issues with anger management which placed the child at risk.

DISCUSSION

On appeal, appellant does not contest the juvenile court's jurisdictional findings as to Jo.M. Instead, she contends the court's dispositional order, which removed Jo.M. from her custody, is not supported by substantial evidence and the court failed to consider less restrictive alternatives, which would have allowed Jo.M. to remain with appellant, in conjunction with respondent's provision of necessary services and W.M.'s supervision.

Once the juvenile court finds a child to be within its jurisdiction under section 300, it must conduct a disposition hearing. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248.) If the court declares the child to be a dependent, it then considers whether the child may remain or must be removed from the parent. In order to remove a child from the parent's custody, there must be clear and convincing evidence that removal is the only way to protect the child. (*Ibid*.)

When a parent challenges the dispositional finding which removes the child from the parent's custody, the question is whether that finding is supported by substantial evidence. (*Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1078.) Although the trial court's findings are based upon the elevated standard of clear and convincing

evidence, the substantial evidence test remains the standard of review on appeal. (*In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581; *In re Isayah C.* (2004) 118 Cal.App.4th 684, 694-695.) Removal findings are reviewed under the substantial evidence test, drawing all reasonable inferences to support the findings and recognizing that issues of credibility are matters for the juvenile court. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193; *In re Jasmine C.* (1999) 70 Cal.App.4th 71, 75.)

To support an order removing a child from parental custody, the court must find clear and convincing evidence that "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's ... physical custody ...." (§ 361, subd. (c)(1); *In re Heather A., supra,* 52 Cal.App.4th at p. 193.) "The statute embodies 'an effort to shift the emphasis of the child dependency laws to maintaining children in their natural parent's homes where it was safe to do so.' [Citations.]" (*In re Jasmine G.* (2000) 82 Cal.App.4th 282, 288.) "The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child. [Citations.]" (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136, overruled on other grounds in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.) The court may consider a parent's past conduct as well as present circumstances. (*In re Troy D.* (1989) 215 Cal.App.3d 889, 900.) Evidence of past conduct is probative of current conditions, particularly where there is reason to believe that the conduct will continue in the future. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.)

Appellant argues the juvenile court's disposition order improperly removed Jo.M. from her custody because her own children, M.K. and Ja.M., were well-treated when they lived with her, the stressful circumstances which existed at the time of D.L.'s injuries are

no longer an issue, the court failed to consider alternative dispositions, and Jo.M. would not have been at risk in her custody.

Appellant's arguments are rather startling given the entirety of this lengthy and sad case. D.L. was placed in appellant's care as a foster child by the Stanislaus County Community Services Agency. There was overwhelming evidence that D.L. failed to thrive in appellant's care, based upon his dramatic weight loss, the lack of any organic reason for the weight loss, his weight increase upon receiving fluid and nutrition in the hospitals, the observations of family members as to appellant's failure to nurture D.L., and appellant's own statements that she resented caring for D.L. without family support.

The overwhelming medical evidence indicates D.L. suffered some type of brain injury about two weeks before he was taken to the hospital, based on the existence of old blood in a portion of the brain. Dr. Fields testified D.L. could have been shaken after his well-baby check up on September 10, 2007, which would have resulted in symptoms such as irritability, fussiness, poor sleep, and poor appetite, and accounted for his weight loss. Indeed, W.M. testified that he noticed D.L. appeared extremely tired the night before he was taken to the hospital.

As noted by the court and Dr. Fields, D.L. suffered devastating neurological injuries as a result of the shaking incident, which resulted in his hospitalization on September 20, 2007. Given the severity of the injuries, Dr. Fields testified that the incident could not have occurred the previous day because the infant would not have survived, thus leading to the extremely strong inference that the shaking incident occurred shortly before appellant called the paramedics, when D.L. presented with seizures, lethargy, and vomiting.

Given the overwhelming evidence that appellant inflicted the irreversible neurological injuries suffered by D.L. and failed to take responsibility for her actions, her suggestion that the juvenile court should have placed her own infant, Jo.M., in her

custody completely lacks merit. The juvenile courts conducted two separate and lengthy contested hearings to address the dependency petitions filed as to M.K. and Ja.M., and Jo.M., and considered appellant's repeated denials that she was responsible for D.L.'s devastating neurological injuries, and her insistence that he was accidentally injured when she tripped over Ja.M.'s car seat. As illustrated *ante*, however, there was overwhelming evidence presented in both hearings that D.L.'s brain injuries were not accidental and were consistent with shaken baby syndrome. As Dr. Fields testified in this case, "I think someone picked him up and shook the heck out of him."

We note that throughout both dependency proceedings, appellant repeatedly refused to admit she was responsible for D.L.'s brain injuries and insisted she accidentally dropped his car seat. In the instant appeal, while she has not challenged the jurisdictional findings as to Jo.M., she argues Dr. Plunkett's expert testimony was "unequivocal" that D.L.'s injuries were not caused by shaking. Appellant contends the juvenile court should have acknowledged that her repeated denials of responsibility for D.L.'s injuries were made in light of conflicting expert opinions about the nature and circumstances of D.L.'s brain injuries. As explained *ante*, the juvenile court herein found Dr. Plunkett's testimony lacked all credibility and was internally inconsistent, and the court's factual findings are supported by substantial evidence.

Appellant further argues that the court could have safely placed Jo.M. in her custody because she no longer was faced with the same overwhelming stress that existed when D.L. was injured: "While caring for three young children may have been too much for [appellant], that situation was not present" at the time that Jo.M. was born and taken into protective custody.

To the contrary, the entirety of the record reflects that appellant displayed even more serious emotional problems after Jo.M.'s birth, given her purported suicide attempt, her three-day hold at the hospital, and her threat to commit suicide because W.M. broke

up with her and had a new relationship. In addition, appellant's roommate claimed the suicide attempt was fake and appellant was trying to obtain marijuana from her neighbors. As respondent observed:

> "If [appellant's] alleged overdose was in fact a genuine suicide attempt this is of significant concern. If the overdose was not a genuine suicide attempt and was faked as if alleged by [appellant's] former roommate, there is no less of a concern regarding [appellant's] mental health. Under both circumstances, [respondent] is unable to assess and evaluate the extent to which these issues present a safety risk to [appellant's] children as she refuses to discuss any portion of her case in the absence of an attorney."

Appellant further posits that the court could have placed Jo.M. in her care as long as she was not left alone with the infant, the social worker could have made unannounced visits, and W.M. could have provided the requisite supervision since appellant and W.M. "had expressed their desire to live together." A social worker's unannounced visits, however, would not have addressed the underlying issues in this case since D.L.'s devastating neurological injuries were inflicted in the brief amount of time it took to shake the infant. Moreover, appellant's suggestion that W.M. could have supervised her care of Jo.M. is refuted by the record, which reflects that W.M. moved out of appellant's house after D.L. was injured and he received custody of Ja.M. in that child's dependency proceeding. When Jo.M. was born, appellant told the social worker that she and W.M. were going to find another place and live together. However, W.M.'s offer of proof at the contested hearing was that he no longer had a relationship with appellant, and W.M. told the social worker that appellant's suicide threat was the result of their break up and his new relationship with another person. More importantly, however, the juvenile court was extremely concerned about W.M.'s attitude regarding D.L.'s injuries, because his body language during the contested hearing showed that "he believes what was happening here is a bunch of hooey ... and that he does not believe [appellant] posed any danger to this child."

Appellant contends Jo.M. could have been safety placed in her custody because there was no evidence that she neglected or abused her own children, M.K. and Ja.M. As this court has already noted in the prior appeal, denial is a factor often relevant to determining whether persons are likely to modify their behavior in the future without court supervision, and it is appropriate for the juvenile court to consider a parent's level of denial when determining the risk to the child if placed with that parent. (See *In re Esmeralda B.* (1992) 11 Cal.App.4th 1036, 1044.) The instant record contained significant evidence that appellant had issues managing her anger and frustration, based upon the undisputed statements and observations by appellant's mother, aunt, and sister. Appellant repeatedly denied such problems and failed to take responsibility for D.L.'s injuries, through two separate and lengthy dependency proceedings. Again, as this court has already noted, a parent does not have to agree with a false accusation and should not be punished for attempting to explain why he or she was wrongfully accused. However, the court may conclude a parent's denials reflect an underlying resistance to the treatment needed to effect the behavior changes that will ensure the child's safety. (*Ibid.*)

The juvenile court herein conducted the lengthy hearing in Jo.M.'s case, heard the evidence regarding the nature and circumstances of D.L.'s irreversible neurological injuries and appellant's emotional instability after Jo.M.'s birth, and it was in the best position to weigh the significance of appellant's refusal to accept responsibility for her anger in considering whether there was a substantial risk posed to Jo.M. if the infant was placed with appellant. Appellant insists the juvenile court should have considered alternative means to return Jo.M. to her custody. While the court herein provided appellant with reunification services the court was so horrified by the situation that it "carefully looked through the bypass provisions to see if this might be a case in which this Court could order no services to [appellant] because I seriously doubt her ability to be able to overcome the issues that are present for her to be able to successfully parent

this child in the next six months." The court's disposition order is supported by overwhelming evidence.

DISPOSITION

The judgment is affirmed.